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IN THE

# Supreme Court of the United States

October Term, 1962

No. 542

WESTERN AIR LINES, INC.,

*Petitioner,*

*vs.*

CITY AND COUNTY OF SAN FRANCISCO,

*Respondent.*

**On Petition for a Writ of Certiorari to the District Court of Appeal of the State of California, First Appellate District.**

## REPLY BRIEF OF PETITIONER.

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## REPLY BRIEF OF PETITIONER.

1. Respondent's main contention is that it was decided below on the evidence — both under California law and under the Federal Airport Act and respondent's agreements with the United States — that there was a difference in conditions justifying the difference in rates. It is urged that this factual determination is dispositive of the entire matter.

As allegedly demonstrating that such a factual determination was made by the trial court, respondent quotes portions of Conclusion 7 of the trial court's Conclusions of Law [Br. pp. 2-3; Clk. Tr. p. 61]. On the contrary the trial court paid no heed to the claim of a difference in conditions justifying the difference in

rates. It held simply that the California Municipal and County Airport Act, Cal. Gov. Code §§50470 *et seq.*, as interpreted in *Trans World Airlines v. City and County of San Francisco*, 9th Cir., 228 F. 2d 473, cert. den., 315 U. S. 919, authorized respondent to "contract or lease as it deems fit and such conduct does not amount to discrimination" and that neither the Federal Airport Act nor respondent's agreements with the United States vested petitioner with any right of action for unjust discrimination [Pet. App. pp. 67-70]. The California District Court of Appeal, in affirming the judgment of the trial court on the issues raised under California law, assumed that the trial court "could have properly concluded" from the evidence that there was a difference in conditions justifying the difference in rates [Pet. App. p. 47]. But that assumption was not made an alternative of its decision that petitioner had no rights under the Federal Airport Act and respondent's agreements with the United States [Pet. App. pp. 12-26, 42].

In all events, the facts underlying the discrimination issue and the claimed justification for the difference in rates are uncontradicted in the record.[1] Like the public utility issue, on which the California District Court of Appeal overruled the trial court, the issue of whether the difference in rates was justified by a difference in

[1]It was stipulated that at all times material to this controversy the "common facilities" for the use of which the rates in question were charged were the same for each airline utilizing the Airport [Clk. Tr. p. 29]. No difference was claimed to exist in such facilities, or the expense of providing such facilities, as among the carriers involved here. The content of the evidence as to the exclusive occupancies at the Airport, the commitments with respect thereto and the Airport's growth and expansion was admitted. Its materiality was all that was disputed.

conditions, "involving no evidentiary conflict, presents a question of law" reviewable in this Court [*cf.* Pet. App. p. 27].[2]

2. The meaning and effect of the Federal Airport Act and respondent's agreements with the United States are Federal questions of nationwide consequence to be determined under authoritative decisions of this Court. No concept or relationship rooted in local law is involved, as singularly demonstrated by the holding below that there is no California common law rule against unjust discrimination in public service [Pet. App. pp. 39-40]. The cases cited by respondent (Br. p. 11, fn. 5) to the effect that the content of a Federal right at times may be dependent on state law are clearly inapposite.

If petitioner has a right of action under or by virtue of the Federal Airport Act or respondent's agreements with the United States, the applicable principles for determining the issue of unjust discrimination are declared in *Western Union Telegraph Co. v. Call Publishing Co.*, 181 U. S. 92. ". . . [A]ny difference in charge which is not based upon [a] difference in serv-

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[2] *Western Union Telegraph Co. v. Call Publishing Co.*, 181 U. S. 92, is not to the contrary. There a difference was shown to exist in the conditions under which the telegraphic services were rendered involving the nature and expense of performing the services. The jury was charged that if such difference fairly justified the difference in rates, there was no unjust discrimination. If the difference in rates was found to be disproportionate to the difference in conditions, there was unjust discrimination to the extent of such disproportion. *Id.*, at 97. The evidence as to what extent, if any, there was such disproportion was conflicting. The sufficiency of the evidence to support the Nebraska jury's verdict was held not to be subject to review in this Court. *Id.*, at 103.

ice" is forbidden. *Id.*, at 100. As put by the trial court in that case, a difference "in conditio[n]s affecting the difficulty or expense of performin[g] the service" must exist to justify a difference in the rates for the service. *Id.*, at 97. That there was no difference in the service or the conditions affecting the difficulty or expense of performing the service in the instant case is without dispute. It was stipulated.

Respondent footnotes (Br. p. 8) the recent case of *Board of County Commissioners v. Aerolineas Peruanas, S.A.*, 5th Cir., 307 F. 2d 802, reversing *Aerovias Interamericanas de Panama, S.A. v. Board of County Commissioners*, U. S. D. C. S. D. Fla., 197 Fed. Supp. 230. That case concerned the rights of certain foreign air carriers under the favored nation clause in the Convention on International Civil Aviation, 61 Stat. 1180, which declares that the public airports of each contracting State shall be open under uniform conditions to aircraft of the other contracting States, at no higher charge than paid by its aircraft engaging in similar operations. The contractual principles which measure such rights and which permit exceptions to such clauses made for valuable consideration have no application here.

The airport lease agreements which were there involved, moreover, were offered to all carriers utilizing the airport and involved provisions under which the carriers who accepted and became lessees underwrote the cost of operating the airport. The Administrator of

Civil Aeronautics, in the letter quoted by the Fifth Circuit (307 F. 2d 805-806, fn. 3), justified the lower rates to the lessees on these grounds, among others.

The facts of the instant case are not comparable. United Air Lines was given a 40-year lease incorporating rates for the common facilities. Petitioner was not concurrently offered and in fact was refused a similar integrated lease for any term of years. The only alleged special considerations are that United leased 75 acres of land at the Airport and agreed to construct a maintenance base on such land for its private and exclusive use. But these are not considerations affecting the common facilities or the cost of operating the common facilities, and neither United nor T.W.A. agreed to underwrite the operation of the Airport. That petitioner had no need for private facilities at the Airport which were as extensive as United's cannot justify the higher public service rates which it was charged.[3]

3. There is no question here of applying the civil sanctions of a distinct statute, as in *Nashville Milk Co. v. Carnation Co.*, 355 U. S. 373, nor does this case concern a regulatory scheme and impasse such as involved in *T.I.M.E. v. United States*, 359 U. S. 464. Respondent's reliance on those cases is misplaced.

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[3]The opinion of the Federal District Court in *Aerovias*, 197 F. Supp. 230, 236, recites that the complaints of four domestic air carriers had previously been dismissed for failure to state a cause of action on Federal grounds. Petitioner is informed that appeals were filed by those carriers but before appellate action the cases were settled in consideration of a substantial reduction in the rates.

## Conclusion.

The issues posed by the Petition are of importance in the administration of the Federal Airport Act and the enforcement of the Congressional mandate that public airports developed with Federal funds be operated without unjust discrimination.

For the reasons stated in the Petition, and herein, the Petition should be granted.

November 19, 1962.

Respectfully submitted,

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